***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

475

# BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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21,950

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DONALD R. CURTIN

Appellant

v.

UNITED STATES OF AMERICA

Appellee

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On Appeal From A Criminal Conviction
In The United States District Court
For The District of Columbia

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John C. LaPrade
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Washington, D.C. 20005
ME. 8-1919
(Appointed by the Court)

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2. Whether appellant was prejudiced by proceeding in his defense with joint, retained counsel.

3. Did the Trial Judge improperly admit into evidence, over defense counsel's objection, a statement by the Assistant United States Attorney, as well as testimony of a crime not charged in the indictment, i.e. the theft of Detective Wesley's Maryland auto license plates?

4. Did the Trial Judge improperly permit the cross-examination of appellant concerning an improper and unlawful prior felony conviction?

This case has not previously been before the Court.

Donald R. Curtin
Appellant

v.

United States ofAmerica
Appellee

Docket 21,950

BRIEF FOR APPELLANT

Statement of the Case

This is an appeal from a criminal conviction after jury trial in the United States District Court for the District of Columbia. Leave to appeal in forma pauperis has been granted. This Court has jurisdiction under 28 U.S.C. 1291. The appellant filed the notice of appeal, pro se.

Appellant was convicted of unauthorized use of a vehicle alleged to have taken place in the District of Columbia on or about April 22, 1967. He was sentenced to be imprisoned for a period of sixteen (16) months to four (4) years.

Background

Appellant and a co-defendant, Jack E. Chapman, Jr. were indicted for Unauthorized Use of a Motor Vehicle D. C. Code 22-2204 (1961) and it was alleged that on or about April 22, 1967, within the District of Columbia, Jack E. Chapman, Jr. and Donald R. Curtin feloniously did take, use,

operate and remove, one certain automobile, the property of Downey L. Williams from a certain lot, and did operate and drive said automobile for their own profit, use and purpose without the consent of Downey L. Williams, the owner of said automobile.

The Government proved by the testimony of Pvt. Parker, a D. C. police officer, (Tr. 133) that an auto was being chased into the District of Columbia along Pennsylvania Avenue, S. E. by the Maryland police and he got in the chase, following the car west on Pennsylvania Avenue, S. E., from the District line to the Sousa Bridge, at which time the car jumped the curb and hit a sign on the guard rail and stopped just short of the Anacostia River. The two occupants of the car ran from the car and disappeared in the area of the Anacostia River.

At about 4:30 a.m. the appellant and the co-defendant, Chapman, were arrested by Officer Parker at 14th and Good Hope Road, S. E., both being wet and having a foul odor about them (Tr. 135). He was able to identify only the appellant as an occupant of the vehicle.

Maryland Police Officer Miller identified the co-defendant, Chapman, as the driver of the motor vehicle (Tr. 154).

Maryland Police Officer Saffron identified appellant as a passenger in the motor vehicle. (Tr. 142).

Testimony of the Owner of the Motor Vehicle

Downey L. Williams, the owner of the motor vehicle, testified that on the 13th of April, 1967, a Friday, that he was drinking at Harrigan & Harrigan, a night club in Washington, at about midnight, and had parked his automobile on a parking lot across the street from the night club (Tr. 16). He also testified that he did not give permission to use or operate his vehicle to either of the defendants, Jack E. Chapman, Jr. or Donald R. Curtin. He could not identify either defendant and did not know whether either defendant had driven or used his motor vehicle (Tr. 26). The ignition was not locked and no key was necessary (Tr. 17).

The Stolen Tags

When the auto in question was allegedly taken from a parking lot in the District of Columbia it had Ohio license

plates. At the time when the vehicle crashed in the vicinity of the Sousa Bridge it bore Maryland plates. The Government proved that the Maryland plates were the property of and stolen from Detective Wesley (Tr. 8, 33).

Appellant and the co-defendant, Jack E. Chapman, Jr., were defended by joint counsel, who was retained. The entire case for the Defense consisted of the testimony of Appellant.

TESTIMONY OF APPELLANT

Donald Roy Curtin testified (Tr. 184) that on August 13 that he and the co-defendant, Jack Chapman, were drinking with Danny Williams, the owner of the auto in question, at Harrigan's in Washington. The Appellant testified that the owner of the car mentioned that the Appellant and co-defendant could take Mr. Williams' auto which was unlocked and needed no key, since the ignition was unlocked (Tr. 186), for the purpose of going to get some girls in Maryland and that when appellant and the co-defendant returned with the car and the girls, the owner of the auto, Downey Williams, was gone. The Appellant testified (Tr. 191) that the co-defendant drove the car when they left Harrigan's.

## SUMMARY OF THE ARGUMENT

A. The Government failed to prove that Appellant removed, used or operated the vehicle.

The appellant, Curtin, was entitled to a judgement of acquittal under Rule 29A of the Federal Rules of Criminal Procedure at the conclusion of the Government's case because Appellant was a passenger in the vehicle, and the Government totally failed to prove any guilty knowledge on Appellant's part in its case in chief.

B. Prior Conviction.

The Trial Court, over the objection of defense counsel permitted the cross-examination of Appellant's co-defendant concerning a prior illegal and improper felony conviction, when in fact the co-defendant had made a plea of guilty to a misdemeanor.

C. Admission of Evidence of Another Crime.

The Trial Judge erred in allowing the Assistant U. S. Attorney to refer to the theft of Auto license plates evidence in his opening argument and subsequently to present evidence of the theft of Detective Wesley's tags and the

subsequent placement of these license plates on the motor vehicle used allegedly without authority. The evidence admitted regarding the alleged theft of the Police Detective's auto plates was so prejudicial as to require that Appellant be given a new trial.

D. Joint Counsel.

The record is completely silent as to whether appellant had the opportunity to make, or in fact made an informed decision, after appropriate advice to proceed with joint counsel. Lollar v. U.S., 126 U.S. App. DC , 376 F2d 243. The record shows that the Trial Judge failed to make any affirmative inquiry as to whether the joint counsel had made any appraisal or advised his clients of the risk of proceeding with joint counsel. Here as in Campbell v. U.S., 122 U.S. App. DC 143, 352 F2d 359 (1965) the joint counsel was retained. In such a case the burden is cast on the Government to show beyond a reasonable doubt that the denial of defendant's rights is harmless error.

## ARGUMENT

### I. The Appellant Was Improperly Convicted of unauthorized use of a motor vehicle.

#### A. FAILURE OF PROOF.

Defense counsel made a motion to dismiss the indictment (Tr. 170), which was renewed at the end of the Government's case (Tr. 181). The Trial Court denied the motion.

The Trial Court erred in failing to grant a motion to dismiss as to appellant, Curtin, who was a passenger in the motor vehicle at the time it crashed in the vicinity of the Sousa Bridge.

Maryland Police Officer Saffron identified Curtin (Tr. 142) as the passenger in the car at the time the chase occurred through Maryland into the District of Columbia. In the Government's case in chief there was no proof whatever that appellant, Curtin, a passenger, had used, operated, or removed the vehicle from the District of Columbia. Cephus v. U.S., 117 U.S. App. D.C. 15, 324 F2d 893.

The Government also totally failed to show in its case in chief any guilty knowledge that the vehicle had been operated or used without the authority of the owner. Kemp v. U.S. 114 U.S. App. D.C. 88, 311 F2d 774.

The guilty knowledge required by Goodman v. U.S. 124 U.S. App. D.C. 135, 362 F2d 965 was not satisfied by the Government's proving appellant, Curtin's, flight from the vehicle. The guilty knowledge required by Goodman and Kelp, supra, is that a mere passenger must be proven to have knowledge that the car was taken without the owner's permission. This the Government totally failed to prove. Appellant's flight was as consistent with innocence on the unauthorized use charge as with guilt. The Motion to Dismiss should have been granted.

The Court failed to give any instruction regarding guilty knowledge by a passenger of a vehicle allegedly used without authority.

The Government totally failed to prove that appellant Curtin, aided or abetted the driver of the car, co-defendant Chapman, since the owner did not know if Appellant had used the vehicle (Tr. 26).

It is respectfully requested that thic Court reverse the jury verdict and enter a judgment of acquital for appellant Curtin, based on the motion to dismiss made by defense counsel at the conclusion of the Government's case.

## B. EXAMINATION OF APPELLANT CONCERNING AN IMPROPER AND ILLEGAL PRIOR CONVICTION WAS PREJUDICIAL

The Trial Court allowed, over defense counsel's objections, the Assistant United States Attorney to question appellant on cross-examination regarding an alleged conviction for attempted robbery (Tr. 190).

The Assistant United States Attorney asked, "Are you the same Donald Roy Curtin who on January 14, 1966, was convicted of attempted robbery in Criminal Case No. 880-65 in this Court?" (Tr. 199). The Appellant answered, "Yes." The file jacket in U.S. v. Curtin, et al, Criminal Case 880-65 in which Appellant was indicted for the crime of robbery and in which Appellant made a plea ofguilty to the charge of attempted petit larceny on December 6, 1965. The order of conviction in Case No. 880-65, filed January 11, 1966, shows that Appellant was convicted, upon his plea of guilty, of the offense of attempted robbery.

The file jacket in Case 888-65 shows Appellant's revocation of probation and committment on the charge of attempted petit larceny.

Therefore, it is submitted that the Trial Court made a reversible error in allowing improper cross-examination and impeachment of Appellant over the objection of the defense counsel concerning a felony conviction which is, on its face, improper and unlawful.

The Assistant United States Attorney in the presence of the jury prejudicially sought and obtained an affirmative answer from Appellant regarding an attempted robbery conviction when, in fact, Appellant had made a plea of guilty to the lesser offense of attempted petit larceny, a misdemeanor of considerably less consequence. Appellant should not be bound by the affirmative answer, as he may not have known with certainty the crime to which he made a plea of guilty.

The Government has been allowed on cross-examination to show and make reference to a crime for which Appellant was indicted and not properly convicted to the extreme prejudice of appellant. Manley v. U.S. 238 F2d 221; US. v. Carserta 199 F2d 905.

Since the file jacket was readily available, the Assistant United States Attorney was at least negligent in cross-examining appellant, Curtin, regarding his "prior conviction for attempted robbery," because a mere cursory

examination of the jacket in Case 880-65 would have indicated that there was no proper and lawful conviction on the charge of attempted robbery, but in fact the plea of guilty was made to the crime of attempted petit larceny.

This prejudicial cross-examination regarding an illegal prior conviction was both erroneous and prejudicial. Gilbert v. U.S. 366 F2d 923; Cert. denied, 388 U.S. 922.

## C. PREJUDICIAL ADMISSION OF EVIDENCE OF ANOTHER CRIME

The Trial Court improperly admitted testimony and reference thereto by the Assistant United States Attorney to another crime not charged, i.e. theft of Detective Wesley's tags.

The record is replete with testimony and reference thereto by the United States Attorney to the Maryland automobile tags that were stolen from Detective Wesley's automobile. This testimony and reference thereto was extremely prejudicial to defendant and substantially denied him a fair trial.

The Assistant United States Attorney in his opening statement said "the set of Maryland tags at that time belonged to Detective George Wesley" (Tr. 8). The Prosecutor also

displayed the allegedly stolen, Maryland tags at counsel table in plain sightoof the jury and was admonished at the bench by the Court for so doing (Tr. 11). It is significant to note in connection with this that the Maryland tags, the property of Detective Wesley were never offered in evidence.

Over defense counsel's objection (Tr. 32) the Court allowed Detective Wesley to testify (Tr. 33) that the tags were stolen from his car at Nixon's Gulf Station located at 14th and Good Hope Road, S. E.

The Appellant testified (Tr. 193) in response to a question from the Court, "Did you pick up any tags?" The Appellant responded, "Yes, sir." This improper and prejudicial examination clearly implicated the co-defendant and Appellant in the theft of Detective Wesley's tags, even though the Trial Court admonished the jury that the defendants were not charged with stealing any tags or speeding (Tr. 224). It is abundantly clear that the testimony regarding the theft and use of Detective Wesley's tags was extremely prejudicial. The introduction of evidence of appellant having committed another offense with which he was not charged and for which he was not convicted is both erroneous and prejudicial. Gilbert v. U.S. 366 F2d 923, Cert. denied, 388 U.S. 922.

The Trial Court permitted testimony over the objection of defense counsel (Tr. 164, 165, and 166) that the mechanic, Robert Carper last saw Detective Wesley's car at 12:00 P.M. on the evening of Friday, April 21, 1967, and the tags were on the car at that time. Even though such testimony was of no probative value as to guilt for unauthorized use, the Trial Court stated "I don't see that it makes any difference." (Tr. 165)

The Trial Court had the duty to exclude evidence of other crimes if in the exercise of his discretion he finds its probative value is outweighed by its prejudicial character. U.S. v. Johnson, 382 F2d 280. The prejudicial character of Carper's testimony, which did not implicate the defendants is apparent.

## D. JOINT COUNSEL

Appellant has been and was denied the right to determination by the Court and/or by retained counsel to make an informed decision, after appropriate advice as to his right to proceed with separate counsel. Appellant had a right to be warned by the Trial Judge and the joint counsel should have been questioned as to whether the Appellant and co

co-defendant had been duly advised of the risk of the very potential conflict of interest existing in proceeding with joint counsel, even though retained. The record is totally and completely silent as to any such inquiry.

Therefore, under Campbell v. U.S., supra, the burden is on the Government to show beyond a reasonable doubt that the denial of defendant's rights to be apprised of the facts necessary to make an intelligent and informed decision not governed by poverty or lack of information, nor the availability of assigned counsel is harmless error.

The record fails to show the inquiry and informed decision required by Lollar v. U.S. 126 U.S. App. D.C. , 376 F2d 243 and Ford v. U.S. 379 F2d 123.

## Conclusion

For the foregoing reasons, the jury verdict should be set aside and the Appellant acquitted or, alternatively, this proceeding should be remanded for a new trial consistant with the arguments made and authorities cited above.

Respectfully submitted,

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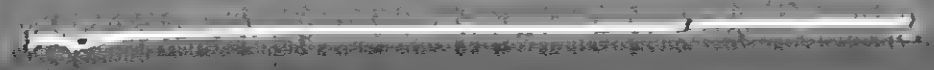

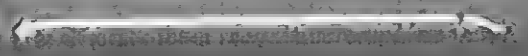

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## ISSUES PRESENTED

In the opinion of the appellee, the following issues are presented:

1. Whether testimonial evidence that Maryland license plates were stolen and found on the wrecked vehicle was admissible as proving appellants' guilty knowledge that the vehicle was used without the authority of the owner and in the District of Columbia.

2. Whether appellants, if they have standing to complain, were prejudiced by appellant Curtin's affirmative answer to the cross-examination question, "Are you the same Donald Roy Curtin who . . . was convicted of attempted robbery . . .?" when Curtin had in fact been convicted, on his plea, of attempted petit larceny.

3. Whether appellants were prejudiced by proceeding with retained joint counsel.

4. Whether appellant Curtin may raise the issue of sufficiency of evidence when no motion for a judgment of acquittal was made at trial. If the issue may be raised, whether he, as a passenger, was improperly convicted of authorized use of a motor vehicle.

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* This case has not previously been before the Court.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21,950

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DONALD R. CURTIN, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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No. 21,951

---

JACK E. CHAPMAN, JR., APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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**Appeal from the United States District Court for the District of Columbia**

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## BRIEF FOR APPELLEE

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## COUNTERSTATEMENT OF THE CASE

A one-count indictment charging appellants with unauthorized use of a motor vehicle was filed in the District Court on August 17, 1967. Appellants demanded trial by

jury and were tried before Judge John J. Sirica and jury and were found guilty as charged in the indictment. On March 22, 1968, appellants were each sentenced to imprisonment for a term of sixteen months to four years.

### A. The Government's Case

On April 13, 1967, a Friday, Downey Lyon Williams drove his 1958 red and white V-8 Chevrolet to Harrigan's Restaurant in Washington, D.C., and parked it in a lot across the street from the restaurant. Shortly after midnight, Williams came from the restaurant, found his car gone, and notified the police (Tr. 16). He did not know appellants and had not given either one permission to use the car. He never saw the car again. (Tr. 17, 18.) On April 20, 1967, George R. Wesley parked his car at a 14th and Good Hope Road Washington service station for repair work. The license tags on Wesley's car, "Maryland ET-9890," were gone when Wesley returned to the station on April 23, 1967. (Tr. 32, 33.)

At about 2 a.m. on April 22, 1967, Maryland State Troopers David S. Miller and Louis W. Saffron were on duty in Prince Georges County near the District line. They observed a red and white 1958 Chevrolet with Maryland tags and faulty exhaust system drive past them. They then drove alongside the Chevrolet. Miller identified appellant Chapman as the driver. (Tr. 155.) Saffron identified appellant Curtin as the passenger (Tr. 142). The car sped away with the patrol in pursuit on Pennsylvania Avenue into the District at speeds up to ninety miles an hour (Tr. 137-141, 152-155). Metropolitan Police Department Detective Horace M. Parker, driving a police car, joined the chase inside the District line and with the Maryland patrol car attempted a running road block near the Sousa Bridge in Washington (Tr. 133, 139). The Chevrolet crashed into the bridge and went down onto the bank of the river. Two men were observed running west from the car along the river bank next to a brick wall containing unused sewer outlets. (Tr. 133,

134.) A witness who knew appellants observed the crash and later saw both appellants coming from a sewer outlet (Tr. 178, 179). Shortly thereafter, Parker arrested both appellants at 14th and Good Hope Road and recognized Curtin as one of the men he had seen running toward the sewer (Tr. 135). Both appellants were wet and foul-smelling (Tr. 135). Wesley's missing license plates were found on the crashed vehicle (Tr. 125). The wrecked car had the same serial number (Exhibit 3) as Williams' Ohio registration and title (Exhibits 1 and 2).

### B. Defense Case

Appellant Curtin testified that he and appellant Chapman were drinking at Harrigan's on April 15, 1967, and that Williams gave them permission to take the car to pick up girls, but that when they returned to Harrigan's, Williams could not be found (Tr. 184-188). He further testified that he and Chapman picked up tags at 14th and Good Hope Road the same night they were arrested because they thought the 1967 Ohio tags had expired, and that they put them on the car, drove to the District, and hid in the sewer (Tr. 192-194). Finally, he testified that he was the same Donald Roy Curtin who on January 14, 1966, was convicted of attempted robbery in Crim. No. 880-65 in the District of Columbia District Court (Tr. 199). Appellant Chapman did not testify.

## ARGUMENT

### I. Testimony that the tags found on the stolen Chevrolet were tags other than the car owner's and that they had also been stolen was admissible.

(Tr. 125, 159)

At trial, the Government introduced into evidence (1) Ohio license plates which had been found in Maryland by the Maryland Highway Patrol after the appellants were arrested, and (2) the Ohio vehicle registration and title

of the owner of the stolen vehicle, witness Williams. The identification serial number of the car driven and wrecked by the appellants and the identification serial number on the Ohio registration were identical. But the wrecked car displayed Maryland tags. It was incumbent upon the government, to counter the obvious defense of permission begun in cross-examination of Williams, to show that the Maryland tags on the vehicle were not obtained in proper course. The Government accordingly introduced testimonial evidence showing that the Maryland license tags had been taken shortly before the defendants' arrest from a car owned by the witness Wesley, circumstantially showing that persons in the car during the chase had knowledge that the same vehicle was being operated without the authority of its owner and disguised from his—or police—recognition.

Evidence of another criminal act is admissible (1) if it is so connected with the crime charged as to establish a common scheme or plan so associated that proof of one tends to prove the other, (2) if both are connected with a single purpose and in pursuance of a single object thus negating mistake or accident, or (3) if necessary to establish identity, *guilty knowledge*, intent, motive, or any element of the crime charged. *Jackson* v. *United States*, D.C. Cir. No. 21,453, decided May 22, 1968; *Drew* v. *United States*, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964); *Harper* v. *United States*, 99 U.S. App. D.C. 324, 239 F.2d 945 (1956); *Bracey* v. *United States*, 79 U.S. App. D.C. 23, 142 F.2d 85 (1944), *cert. denied*, 322 U.S. 762 (1944). The evidence showing that the Maryland tags were stolen was not only proper to prove guilty knowledge under the well-recognized exceptions, but was necessary to complete the Government's case.[1]

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[1] Appellants contend that the prosecutor displayed the Maryland tags at counsel table but failed to introduce them. A careful reading of the record shows that only the Ohio tags were present at trial. The Maryland tags were not displayed. Had they been present, there would have been no reason not to introduce them; however the testimonial identification of them as the tags on the fleeing car was sufficient. (Tr. 125, 139.)

**II. The fact that appellant Curtin answered yes to Government counsel's question of whether he had been convicted of attempt robbery, when in fact he had been convicted of attempt petit larceny, does not constitute reversible error.**

Appellant Curtin answered in the affirmative when asked by the prosecutor on cross-examination if he had previously been convicted of attempted robbery. Curtin had pled guilty to attempted petit larceny. At trial, appellant Curtin did not seek to explain the circumstances of the prior crime, nor was any effort made to clarify the description of the previous conviction. The file jacket shows that the original charge was in fact attempted robbery, as appellants state in their briefs. Clarifying the description of the crime would have only revealed an earlier prosecutorial leniency to which Curtin's failure to respond might set poorly with the jury. At least, defense tactical considerations existed which inhibited any further play on the fact that there existed a previous conviction founded in deceit. A similar situation was presented in *Bohol* v. *United States*, 227 F.2d 330 (9th Cir. 1955). There defendant admitted on cross-examination that he had previously been convicted twice, but he failed to reveal that the second had been reversed on appeal and nolle prossed. The court stated that the defendant was "in no position to ask for a reversal because of his own failure to bring out the effect of the nolle prosequi."

Here, where appellants made no effort (possibly for good reason) to correct the mistake, they also are in no position to ask for reversal. Had the claimed mistake been rectified or avoided, the impeaching evidence could still have reached the jury. Either attempted petit larceny or attempted robbery was properly relative to credibility. *Gordon* v. *United States*, 127 U.S. App. D.C. 343, 383 F.2d 936 (1967). The erroneous description and affirmative answer worked no prejudice to either defendant and compels no reversal. *Campbell* v. *United States*, 85 U.S. App. D.C. 133, 176 F.2d 45 (1949).

**III. There is no basis in the record for an informed speculation that appellants were prejudiced by joint representation.**

(Tr. 19-29, 184-188, 194)

When the record fails to show that co-defendants made an informed decision to proceed with one attorney, the omission is still harmless error unless the co-defendants were prejudiced by the joint representation. *Campbell* v. *United States*, 122 U.S. App. D.C. 143, 352 F.2d 359 (1965); *Lollar* v. *United States*, 126 U.S. App. D.C. 200, 376 F.2d 243 (1967); *Watkins* v. *United States*, 240 A. 2d 656 (D.C. App. 1968).

In *Campbell*, the charges against the co-defendants Campbell and Glenmore were housebreaking and petit larceny. The Government's case rested on proof of the possession of recently stolen property by defendant Campbell. Campbell testified that his co-defendant Glenmore had been with him all evening and the Government's case showed Glenmore present with Campbell while Campbell was in possession of stolen items shortly after the crime. This Court described the clear prejudice found existent towards Glenmore as follows:

> Defense counsel stated that he had virtually ignored Glenmore and "unwittingly . . . made all comments with reference to the Defendant Campbell." In his argument to the jury, defense counsel did not once mention the special problems presented by the case against Glenmore. And it was the judge, not defense counsel, who, after all the evidence was in, raised the issue of the insufficiency of the evidence as to Glenmore. Furthermore, defense counsel made no effort to dissociate Glenmore from Campbell, against whom the Government presented a stronger case. At 361.

Those problems are not present in the case at bar. The appellants' theory of the case, apparent in the record, was that the witness Williams had given defendants permission to take the car but that he was either too intoxi-

cated to remember or was lying at trial; and further, that upon appellants' effort to return the car, Williams had left the scene of the loan contrary to the social plans of which they claimed he was part (Tr. 19-29, 184-188). Appellant Curtin added when he testified that both appellants changed license plates on the car because both thought that perhaps the current Ohio plates had expired (Tr. 194). Defense counsel made a thorough argument on behalf of each defendant, expanding upon their theory of the case, attacking Williams' credibility, and exploiting the combined presence of Curtin and Chapman as innocent comrades. The issue of insufficiency was never raised as to either defendant. That alternative would have detracted from their position that they did take the car but that Williams was not to be believed and had in fact given them permission. Finally, the Government's case was equally strong against both. They were both seen in the car during the chase, they were both seen running from the car after the wreck, they were both seen emerging from the sewer, and they both returned to the spot from which the Maryland plates were taken where they were both arrested in foul-smelling wet clothing.

Neither was the *Campbell* problem of cross-examination present below. In *Campbell*, the testifying co-defendant inculpated the silent one. Here, Curtin's testimony, albeit weak, exculpated both himself and co-defendant Chapman by asserting that both had permission from Williams to take the car and that both made an effort to return it. Chapman had no reason to cross-examine Curtin. Further, as to Chapman, the fact that Curtin testified while he remained silent is not a sufficient showing of prejudice to warrant reversal of his conviction. *Rhone* v. *United States*, 125 U.S. App. D.C. 47, 365 F.2d 980 (1967); *Turner* v. *United States*, 241 A.2d 736 (D.C. App. 1968). And surely the jury did not expect that Chapman had any conflict with Curtin's testimony; the defense depended upon this consensus of defendants—their combined word, as co-actors, against Williams and the totality of the

circumstantial evidence. No conflict or hostility existed; indeed, the potential advantage of consolidating the credibility of the defendants presented a favorable defense tactic. There is no basis in the record for an informed speculation that appellants were prejudiced by joint representation. *Lollar* v. *United States, supra.*

**IV. There was abundant evidence to support appellant Curtin's conviction.**

(Tr. 170, 210)

At trial, defense counsel moved to dismiss the indictment for fatal variance. The claimed variance was between the date which the indictment alleged that the car was unlawfully used (April 22, 1967) and the date that Williams testified the car was taken (April 15, 1967).[2] The trial judge denied the motion. (Tr. 170). No motion for a judgment of acquittal was made. Appellant Curtin now argues that his conviction should be reversed because of a claimed insufficiency of evidence. No such claim may now be made on appeal if appellant has not moved for a judgment of acquittal at trial. *Battle* v. *United States*, 92 U.S. App. D.C. 220, 206 F.2d 440 (1953), *Cratty* v. *United States*, 82 U.S. App. D.C. 236, 163 F.2d 844 (1947). Only if manifest error or serious injustice is apparent will a failure to make the motion be overlooked. *Battle* v. *United States, supra.* It is submitted that no such error exists here, where the evidence shows that the vehicle was taken without the owner's permission, that the original license plates were then discarded, that appellant was identified as a passenger in the vehicle at the start of a high speed chase one week after the vehicle was taken, that appellant was seen running from the vehicle toward a sewer after it crashed in the District of Columbia, that appellant was seen emerging from a sewer shortly after

[2] Of course there was no variance inasmuch as the unlawful use on April 22, apart from the original taking, constituted the charged offense.

the crash, that appellant was arrested in foul-smelling wet clothes shortly after the crash, and that the crashed vehicle displayed stolen license plates.

Even assuming sufficiency of the evidence is reviewable at this point, the question must be measured against all the evidence in the case, including appellant Curtin's testimony.[3] And in his testimony, Curtin put the sufficiency question beyond dispute by admitting that he took part in the original obtaining of the car and of the separate tags appearing on the car at the time of apprehension. The jury was properly instructed on the evidence of flight, (Tr. 210) and its verdict, based on all the evidence, was inescapable.

## CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
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FRANK Q. NEBEKER,
THOMAS LUMBARD,
RICHARD N. STUCKEY,
*Assistant United States Attorneys.*

[3] See *Cephus* v. *United States*, 117 U.S. App. D.C. 15, 324 F.2d 893 (1963). Consideration of whether the waiver rule is applicable in this case is not necessary, since no motion for judgment of acquittal was made at the end of the Government's case.

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# REPLY BRIEF FOR APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21,950

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DONARLD R. CURTIN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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No. 21,951

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JACK E. CHAPMAN, JR., Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

---



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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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No. 21, 950

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JACK E. CHAPMAN, JR., Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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REPLY BRIEF FOR THE APPELLANTS'

I THE STOLEN TAGS

It is stated in the Government's Brief, page 4, note 1, that the stolen Maryland tags were not displayed to the jury. This contention is not borne out by the record. The Maryland tags were the property of Detective George Wesley as stated in the prosecutor's opening statement (Tr. 8).

The defense counsel stated (Tr. 11), "That is stealing license tags from a police officer", to which the Trial Court responded, "That might be an admission, it might be perfectly all right". Defense counsel then stated, "He has the license tags on the desk in front of the jury ... " (Tr. 11). The Court then admonished the prosecutor for displaying the tags. These were the Maryland tags later referred to as stolen by their owner, Detective Wesley (Tr. 33), one of the first Government witnesses, but the Maryland tags were not offered in evidence.

The Government now admits on Page 4 of its Brief that proof of the uncharged crime, i.e., stealing the Maryland tags, was necessary to complete the Government's case, notwithstanding the fact that the trial judge instructed the jury to disregard this very evidence (Tr. 33, 224).

II THE PRIOR CONVICTION OF APPELLANT CURTIN

Appellants seek to distinguish over Bohol v. United States 227 F 2d 330 cited by the Government. Bohol is distinguishable because Appellant Curtin did not know to what crime he had entered a plea of guilty until the suspended sentence in Cr. No. 880-65 was revoked and he was furnished with the papers at a time subsequent to the February 2, 1968 trial of the above case.

Therefore the rule set forth in Bohol should not apply to the case at bar because Appellants did not know at the time that a mistake had been made by the prosecutor in his cross-examination.

## III MOTION TO DISMISS THE INDICTMENT

Defense counsel made a proper motion for questioning the sufficiency of the evidence at the end of the Government's case (Tr. 170), which should be considered as a motion for acquittal. A motion for discharge would be considered as equivalent of a motion for acquittal. U. S. v. Jones 174 F. 2d 746 (C. A. 111, 1949). The motion was renewed and denied (Tr. 181).

Therefore the Court should review the evidence as to its alleged sufficiency to support the conviction of Appellant Curtin for unauthorized use, since he was only a passenger in the auto.

## CONCLUSION

WHEREFORE it is respectfully submitted that the judgment of the District Court should be reversed.

John C. LaPrade
Attorney for Appellants
(Appointed by the Court)